Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JERRY RUBIN,

Petitioner,

v.

CITY OF SANTA MONICA; MARIA M. STEWART, CITY CLERK; BILL JONES, SECRETARY OF STATE; AND DOES 1-50, INCLUSIVE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where the United States Supreme Court has expressly held that "speech about the qualifications of candidates for public office is 'at the core of our First Amendment freedoms'", and has consistently applied strict scrutiny to election regulations, was it error for the Ninth Circuit to apply the rational basis test and conclude that the City's and State's arbitrary and discretionary regulations on the three-word ballot designation of a candidate's occupation or vocation do not severely burden a candidate's First Amendment rights?

When the State opens up an election ballot to contain a three-word statement about a candidate's political qualifications (in the form of his or her occupation or vocation, as defined by the State), does the State create a limited public forum subject to strict First Amendment scrutiny?

PARTIES TO THE PROCEEDING

The following, and no others, are parties to the instant proceedings:

Petitioner JERRY RUBIN, who was the Plaintiff and Appellant in the courts below. Respondents are the CITY OF SANTA MONICA, a municipal corporation; MARIA M. STEWART, and individual and the Santa Monica City Clerk; BILL JONES, and individual and the California Secretary of State, each of whom were the Defendants and Appellees in the courts below.

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Petitioner respectfully seeks certiorari to review the Opinion by the Ninth Circuit Court of Appeals entered on October 17, 2002, affirming the Order Dismissing Case by the Central District Court of California entered on June 20, 2001, for which a *sua sponte* request for rehearing *en banc* failed to receive a majority vote on February 4, 2003.

CITATIONS TO OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is found at Docket No. 01-56091, *Rubin v. City of Santa Monica, et al.*, 308 F.3d 1008 (9th Cir. 2001), and the Order Dismissing Case by the Central District of California is found at Docket No. CV-00-09544-JSL. The District Court did not publish an opinion in this case. The pertinent rulings appear in the attached appendix at *Appendix A* and *Appendix B*, respectively.

JURISDICTIONAL STATEMENT

The District Court for the Central District of California had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), this being an action arising under the federal constitution and laws, and under 28 U.S.C. §§ 2201 and 2202, this being an action for declaratory relief. On June 20, 2001, the District Court for the Central District of California entered its Order Dismissing Case Pursuant to its Order to Show Cause. Petitioners herein appealed the District Court's Order, over which the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and Federal Rules of Appellate Procedure Rules 1, 4(a), since the Order appealed from was a final order of dismissal of the entire action.

The Ninth Circuit Court of Appeals entered its Opinion affirming the District Court on October 17, 2002. On November 22, 2002, a *sua sponte* request for an *en banc* vote was received by Petitioner from the Ninth Circuit Court of Appeal [*Appendix C*], and on December 16, 2002, Petitioner and Respondent submitted simultaneous Supplemental Briefs re: Sua Sponte Request for Rehearing En Banc. On February 4, 2003, the Ninth Circuit entered an Order advising that the *sua sponte* request failed to receive a majority of the votes of the nonrecused active judges, and the *sua sponte* request was thereby rejected. [*Appendix D*].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

California Elections Code § 13107:

[*See Appendix E*]

California Secretary of State Ballot Designation Regulations, California Administrative Code, Chapter 7 (commencing with § 20710):

[*See Appendix F*]

STATEMENT OF THE CASE

Petitioner Jerry Rubin was a duly qualified candidate for the Santa Monica City Council in the 2000 and 2002 elections, and intends to become a candidate in the next election. Petitioner Rubin has been told by Respondent Stewart, who acts for the City of Santa Monica, that he cannot call himself a "peace activist" on the election ballot in the three-word space allocated for designation of one's primary occupation/vocation.

Petitioner argues that in fact his primary occupation or vocation is, and has been for the past twenty years, best described as a peace activist, and that furthermore the ballot designation regulations are impermissibly vague and discretionary, allowing content based discrimination by the Respondents amongst the candidates as to whom will be allowed to call themselves what on the election ballot.

On August 11, 2000 (and again in 2002), Petitioner Rubin hand-delivered his nomination papers for candidacy to the Santa Monica City Council to the Santa Monica City Clerk, Maria M. Stewart. His filing included his Candidate's Statement and Ballot Designation pursuant to the City of Santa Monica's procedures and as set forth at the Santa Monica Municipal Code § 11.04.120 and the California Elections Code §§ 13107 and 13307, and at the California Administrative Code, Chapter 7, Sections 20710, *et seq.* [2 C.C.R. §§ 20710, *et seq.*]

In Petitioner Rubin's nomination papers, he identified his primary occupation/vocation as "Peace Activist". Respondent Stewart accepted Petitioner's nomination papers but told him that she was rejecting his Ballot Designation because it contained the word "activist". Ms. Stewart also informed Petitioner that "peace officer" would be allowed if Petitioner were a police officer, "environmental educator" might be allowed, but that "peace educator" would probably not be allowed, even though it does not contain the word "activist".

Ms. Stewart then gave Petitioner a copy of the State of California regulations regarding Ballot Designations, and indicated that Section 20716 purportedly prohibited the use of the word "activist". Respondent Stewart advised Petitioner that although she did not "have to" follow the state regulations as a matter of law, the City "chose" to do so. (However, on or about April 10, 2001, the City of Santa Monica proposed and adopted an ordinance "codify[ing] the City's current practice of following the Secretary of State's Ballot Designation Regulations".)

As a result of Respondent Stewart's and Respondent City of Santa Monica's refusal to accept Petitioner's ballot designation, he was the only candidate qualified by the City of Santa Monica *without* a Ballot Designation, the most visible identifier of election candidates in that local election. Plaintiff Rubin alleges that the "Ballot Designation Regulations", 2 C.C.R. §§ 20710, *et seq*., and California Elections Code § 13107 were discretionarily and unequally applied to him, so that he, unlike any other candidate, is not being allowed to accurately identify his vocation/occupation, and that his political speech is being impermissibly burdened.

Petitioner Rubin has had the primary vocation of peace activist for twenty years, having spent the vast majority of his time (well in excess of 40 hours per week) doing what can reasonably be described as "peace activist", and receiving all of his earned income, albeit small, from his anti-war and anti-violence activities.

He has organized and/or attended innumerable demonstrations, sent out thousands of press releases promoting peace, and has contacted and been contacted by reporters for every major newspaper and news organization and been interviewed hundreds of times on both local and national television and radio regarding such issues as the Gulf War, toy guns, the military budget, the need for peace education in early childhood, and the reduction of violence in film, TV and other media including in children's video games and toys.

He has extensively bought and sold message items relating to peace such as pamphlets, buttons, and bumper stickers, made thousands of phone calls, and been listed in the white pages of the phone book as well as on his business cards for many years as "Jerry Peace Activist Rubin".

He was an organizer of and participant in the 1986 Great Peace March, and walked from Los Angeles City Hall to the Lincoln Memorial in Washington D.C. He organized the 10th Anniversary Reunion of the Peace March that was attended by hundreds of the original marchers as well as by Mayor Riordan and former Mayor Bradley. He has been on over 20 hunger fasts to bring attention to peace issues. He and his wife were married at a public peace rally wedding in Santa Monica that was attended by approximately 400 individuals and was covered by the Los Angeles Times newspaper.

He organized the creation of a Mile Long Peace Scroll that he and others hand delivered and officially presented to the Secretary General of the United Nations. He organized rallies around the country to commemorate the creation of the peace symbol, and he has personally stamped the peace symbol on the hands of nearly half a million people, by his own calculations.

Thus, Petitioner's designation of his occupation/vocation as "peace activist" is neither misleading (the prevention of misleading designations being the expressly stated purpose of the regulations, see § 20716(a), California Elections Code § 13107(b)), nor "generic", but is an extremely accurate and specific designation of his actual vocation and exclusive source of income.

He meets the test for a "Vocation" found in the California regulations at § 20714(a)(2): "*Vocation" means a trade, a religious calling, or the work upon which a person, in most but not all cases, relies for his or her livelihood and spends a major portion of his time.*" He also meets the test for "Occupation" found at 2 C.C.R. § 20714(a)(3): "*Occupation"*

means the employment in which one regularly engages or follows as the means of making a livelihood." Nonetheless, the City of Santa Monica to this day persists in refusing to allow Plaintiff Rubin to identify his vocation/primary occupation as "peace activist" on its election ballot, and engages in a highly discretionary and content-based review of submitted ballot designations.

Regardless of whether or not "peace activist" is Petitioner's occupation or vocation, Rubin contends that the regulations are arbitrary, capricious, vague, overbroad, and unduly discretionary. Rubin contends that once the ballot was opened up to a three-word statement about political qualifications, the regulations thereon must past strict scrutiny because they impact core political speech under this Court's precedent.

REASONS FOR GRANTING THE PETITION

A. The Underlying Premise Of The Panel's Decision Conflicts Directly With the Position Of The U.S. Supreme Court And Other Circuits, In Which Ballot Designations And The Like Have Been Declared To Be Critical, Crucial, Climactic, And Core Speech

In it's decision, the Ninth Circuit panel held that California's system (adopted by the City of Santa Monica[1]) of allowing and regulating the placement of a candidate's "occupation or vocation" next to his or name on the election

1. Elections Code §§ 13107(a)(3), 13107(b) and the California Administrative Code, Chapter 7, § 20710, *et seq*. [2 Calif. Code Reg. 20710, *et seq*.], which codes and regulations are being interpreted by, utilized in, and applied to City of Santa Monica elections by the City Clerk under the auspices of the Santa Monica City Charter, Article 14, Section 14.03, and as codified by the City Council on or about April 10, 2001.

ballot is constitutional under the rational basis test, which the panel chose to apply because the regulation, it opined, is "politically neutral", does not severely burden a candidate's First Amendment rights, and is not unreasonable given the City's "[important] interest in preserving the simplicity of its ballot". *Rubin v. Jones*, 308 F.3d 1008 (9th Cir. 2002).

Petitioner contends that the panel is incorrect in several fundamental ways. First, in holding that the ballot designations minimally burden speech and constitute only minor restrictions, the panel's decision conflicts with the tenets of the recent U.S. Supreme Court decision, *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 536 U.S. 765, 153 L. Ed. 2d 694 (2002), in which the Supreme Court noted that **"speech about the qualifications of candidates for public office is 'at the core of our First Amendment freedoms'"**. *Id.*, 122 S. Ct. at 2534. The California Supreme Court, too, has noted that **"[a] major purport of the Elections Code is to insure the accurate designation of the candidate upon the ballot in order that an informed electorate may intelligently elect one of the candidates."** *Salinger v. Jordan*, 61 Cal.2d 824, 826, 40 Cal.Rptr. 361, 395 P.2d 49 (1964). The occupation of a candidate, when placed next to his or her name on the ballot, is plainly political speech about the qualifications of that candidate for office.

Although ignored by the Ninth Circuit, Justice Thomas discussed the proper analysis of election regulations in detail in 1999, in a concurring opinion:

> **When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and**

required that the legislation be narrowly tailored to serve a compelling governmental interest. [citations]

Even where a State's law does not directly regulate core political speech, we have applied strict scrutiny. For example, in *Meyer v. Grant*, 486 U.S. 414, 100 L. Ed. 2d 425, 108 S. Ct. 1886 (1988), we considered a challenge to Colorado's law making it a felony to pay initiative petition circulators. We applied strict scrutiny because we determined that initiative petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.*, at 421. In *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981), we subjected to strict scrutiny a city ordinance limiting contributions to committees formed to oppose ballot initiatives because it impermissibly burdened association and expression. *Id.*, at 294.

When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech. Indeed, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995), the Court suggested that we only resort to our severe/lesser burden framework if a challenged election law regulates "the mechanics of the electoral process," not speech. *Id.*, at 345; but see *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214,

222-223, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989) (first determining that California's prohibition on primary endorsements by the official governing bodies of political parties burdened speech and association and then applying strict scrutiny).

I suspect that when regulations of core political speech are at issue it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a "severe burden."

. . .

The challenged badge requirement [citation] directly regulates the content of speech. The State requires that all petition circulators disclose, at the time they deliver their political message, their names and whether they were paid or unpaid. Therefore, the regulation must be evaluated under strict scrutiny. . . . Content-based regulation of speech typically must be narrowly tailored to a compelling state interest. [citations] The State's dominant justification for its badge requirement is that it helps the public to identify, and the State to apprehend, petition circulators who perpetrate fraud. Even assuming that this is a compelling interest, plainly, this requirement is not narrowly tailored. It burdens all circulators, whether they are responsible for committing fraud or not. In any event, the State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem. [citations]

Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999), concurring opinion by Thomas, J.

The Ninth Circuit panel took the view that the ballot designation regulation was not a severe burden; however, under the *Buckley* analysis, if a regulation concerns core political speech, "we have ordinarily applied strict scrutiny *without first* determining that the State's law severely burdens speech. [citations omitted]" *Id.* Even where the election regulation does not concern core political speech, as Justice Thomas wrote, strict scrutiny has been applied, not the rational basis test applied by the Ninth Circuit in this instance.

Second, the panel's decision also conflicts with the U.S. Supreme Court's fundamental assumptions most recently elucidated in *Cook v. Gralike*, 531 U.S. 510, 121 S. Ct. 1029, 149 L. Ed. 2d 44 (Feb. 28, 2001), in which the Supreme Court expressly noted the potential political damage of unfavorable ballot labels:

> **Indeed, it seems clear that adverse labels handicap candidates 'at the most crucial stage in the election process – the instant before the vote is cast.'** *Anderson v. Martin*, 375 U.S. 399, 402, 84 S. Ct. 454, 11 L. Ed. 2d 430 (1964). **At the same time, 'by directing the citizen's attention to the single consideration' . . . the labels imply that the issue 'is an important – perhaps paramount – consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot' against candidates** as unfaithful. . . . Thus, far from regulating the procedural mechanisms of elections, Article VII

> attempts to 'dictate electoral outcomes.' [citation omitted]. Such 'regulation' of congressional elections simply is not authorized by the Elections Clause.

Cook v. Gralike, 531 U.S. at 525.

Exactly why does California, unlike any other State, have not just a candidate's political party on the ballot, but also a candidate's "occupation or vocation", when the ballot, as the panel notes, has extremely limited space? Surely because, as the U.S. Supreme Court noted in *Gralike*, the State must consider that information extremely *important* — important enough, Appellant contends, to dictate electoral outcomes at the "**climactic moment of choice**" for the voter. *See Rosen v. Brown*, 970 F.3d 169, 175 (6th Cir. 1992).

In *Rosen*, the Sixth Circuit panel held that an Ohio election statute prohibiting placement of the "Independent" designation below a candidate's name on a general election ballot violated the First and the Fourteenth Amendments of the U.S. Constitution, and State's justifications for imposing the burden, including minimizing ballot-generated voter confusion, protecting integrity of established and formally recognized major political parties, and producing more manageable ballot, were *highly questionable*. *Rosen v. Brown*, *supra*.

Although the *Rosen* court did not apply the strict scrutiny test, it did note that "the questions presented by a challenge to a specific provision in a state's election law cannot be resolved by applying a "litmus-paper test. [citations omitted]," but rather must be analyzed under the balancing test iterated in *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L. Ed. 2d 547 (1983), in which "the Supreme Court set forth an

analytical process for making such 'hard judgments' in the context of a challenge to a provision of a state's election laws." *Rosen*, 970 F.2d at 175. As the *Rosen* court noted:

> An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice. [citations omitted] With respect to the political designations of the candidates on nomination papers or on the ballot, a State could wash its hands of such business and leave it to the educational efforts of the candidates themselves, or their sponsors, during the campaigns. [citation omitted] **Once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws.** [citations omitted].

Id., at 175.[2]

Having decided that a candidate's occupation or vocation was important enough to put it on the election ballot, California, and consequently the City of Santa Monica, must be able to pass constitutional scrutiny in the legitimacy and strength of each

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2. The Ninth Circuit panel writes that "a ballot is a ballot not a bumper sticker." *Rubin*, at 1016. Petitioner points out that while that may be true in most states, California has voluntarily *turned* the ballot into a bumper sticker by including "three words" about the candidate's qualifications on the ballot, in addition to the usual party affiliation.

of its purported interests sufficient to overcome the burden on Petitioner's, and every other candidate's or potential candidate's rights. Petitioner Rubin submits that this has not been done.

Petitioner contends that the appellate panel in this case did not adequately contemplate the importance of the speech at issue (i.e., candidate qualifications, which the U.S. Supreme Court has recently called "core" to elections), the weight of the burden imposed by the ballot designation restriction (i.e., an arbitrary restriction on what the U.S. Supreme Court has recently called "the most crucial stage in the election process – the instant before the vote is cast"), and the weakness of the City's purported interests (i.e., the same interests regarding as insufficient by the Sixth Circuit in *Rosen*, which has been favorably cited 16 times since it was published).

Any speech that can change the outcome of elections is presumptively extremely important. This is all the more true in small local elections like that for Santa Monica City Council, where busy voters are unlikely to read or hear candidate information prior to election day, when they cast their ballots. In a presidential campaign, voters can hardly escape the national T.V. ads, the televised debates, the party mailings, etc., whereas local election candidates do not have that mass media exposure. Here you have a State election regulation that adds candidate qualifications to the ballot because those qualifications are *important* to a voter's decision, yet the Ninth Circuit panel said that the regulation "does not infringe on core political speech", *Rubin*, 308 F.3d at 1015-1016, and is simply a most minimal burden.

Petitioner contends that this ruling is fundamentally erroneous and in confict with this Court's precedent.

B. The Election Ballot Is A Limited Public Forum And The Ballot Designation Regulations Should Therefore Have Been Subject To Strict Scrutiny

The courts below essentially dismissed the forum issue altogether, with the District Court, for example, holding that, "It is clear that based upon a reading of the statute and accompanying regulations, that ballot designations are not intended to be a forum for political speech, but is to be a neutral, non-political description that designates either a profession, vocation or occupation."

Petitioner contends, however, that the issue is not nearly so simple and that in reality the ballot is a limited public forum under federal law. As recently as 1997, the Ninth Circuit itself held that:

> A forum created by the government to allow a limited class of speakers to address a particular class of topics, such as the voter's pamphlet here, is a limited public forum. *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990). As such content neutral restrictions must be shown "to serve a significant state interest in a narrowly tailored fashion and leave open ample alternative channels of communication." *Id.* (citing, *Perry Educ'n Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).

NAACP v. Jones, 131 F.3d 1317 (9th Cir. 1997) (emphasis added); *see also International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 120 L. Ed. 2d 541, 550, 112 S. Ct. 2701, 2705 (1992) ("The second category of public

property is the designated [limited] public forum, whether of a limited or unlimited character – property that the state has opened for expressive activity by part or all of the public.")

A content-based regulation of speech in a limited public forum is subject to strict scrutiny: "Regulation of such property is subject to the same limitation as that governing a traditional public forum." *Id.* Therefore, the courts below erred in applying the rational basis test, rather than the strict scrutiny test, for this reason as well.

C. Contrary To The Panel's Conclusions, The Regulation Of Ballot Designations Is Arbitrary, Discretionary And Non-Neutral, And "Activist" Is An Advertised Job Position Or Occupation

The Ninth Circuit also took the position that the regulations are neutral and non-arbitrary, and that furthermore "activist" is as a matter of fact (or law) simply a status. First, Petitioner points out that organizations such as the Sierra Club and Greenpeace, for example, regularly advertise in California for positions with the job title of "activist", and refer to "career opportunities and benefits" as an activist.[3]

Better highlighting the absurdity of the regulations, however, and the illegitimacy of the actual interest being served by the

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3. The definition of "Vocation" is found in the California regulations at § 20714(a)(2): "*Vocation" means a trade, a religious calling, or the work upon which a person, in most but not all cases, relies for his or her livelihood and spends a major portion of his time.*" "Occupation" is found at 2 C.C.R. § 20714(a)(3): "*Occupation" means the employment in which one regularly engages or follows as the means of making a livelihood.*"

challenged regulations, is the telling deposition testimony of Maria Stewart, the Santa Monica City Clerk, who is the person who decides what "three words" a candidate is allowed to place beside his or her name on the Santa Monica election ballot to represent his or her "occupation or vocation".

Respondent Stewart stated in her deposition that she would accept the designation of "businessman" for an arms merchant, but that she would *reject* the more accurate and specific designation of "arms merchant", for example, because it would (in her opinion, and perhaps after "consulting with consultants"), be "politically unacceptable" in Santa Monica and might "be inflammatory to members of the public": "I would be concerned about safety on both sides. That if the circumstances were such as you state them, that members of the public would react to it in a violent manner." [Depo. of Stewart, pp. 64-65.]

Similarly a "hot dog stand vendor" would have a different impact on a voter than "businessman" or "restaurateur", and in fact the more general description, readily allowed by the City Clerk, informs the voter far *less* than the specific description, even though "informing the voter" is an explicit purpose of the regulations. *See* 2 C.C.R. § 20710(a).

It is undisputed that there is wide latitude in which descriptions to allow or disallow, as shown in the following deposition testimony by Maria Stewart, Santa Monica City Clerk, in which counsel tries to determine just how much discretion the City Clerk has with respect to the interpretation of the regulations:

> Q [By Mr. Fosbinder] So if somebody came to your office, dressed in a nice suit, and you happened to notice that they drove up in a nice Mercedes and they were very polite and they wanted to become a

candidate and they had the signatures and their proposed designation was businessman, isn't it true that normally you wouldn't even ask what they did for a living beyond businessman?

A No, that's not true.

Q So normally you would ask them what they did; is that right?

A Probably.

Q Okay. And if they said, "I am a real estate developer," would you then accept the ballot designation "businessman"?

THE WITNESS: It depends. Each circumstance with each potential candidate is different. When they come in, they come in with their ballot designation, their candidate statement. The whole thing fits together, and the whole thing is considered as one package. It is not just a consideration of the ballot designation by itself, isolated from all the other issues.

BY MR. FOSBINDER:

Q So you would say you had quite a bit of discretion then?

THE WITNESS: Yes.

BY MR. FOSBINDER:

Q Yes, you agree you have quite a bit of discretion?

A (No audible response.)

Q You're nodding.

A Yes, I am. I'm sorry. That's correct.

Although the decision about whether or not a candidate's ballot designation is allowed is at the discretion of the City Clerk, any ability to appeal the decision is essentially non-existent:

MR. FOSBINDER:

Q. Is there any process of appeal that a candidate has if you turn them down for their proposed ballot designation?

THE WITNESS: The candidate can give me an alternate designation.

BY MR. FOSBINDER:

Q Okay. Is that the only process of appeal, short of obviously going to court, as we have?

A As far as I know, I believe that is it.

> Q Okay. So in addition to agreeing that you have a lot of discretion, you agree that there is no process of appeal for your turning down a ballot designation?
>
> A There is no appeal that is set forth in the Elections Code to follow, no.

[Deposition of Stewart.]

Note that the regulations themselves are vague and overbroad in and of themselves, not just as they are interpreted by the Santa Monica City Clerk. Under the regulations, "homemaker", "child rearer", "mother" and "father" are *acceptable* designations, however "wife" and "husband" are *prohibited* designations. The latter are prohibited as "statuses" (defined as "a state, condition, social position or legal relation of the candidate to another person, persons, or the community"). 2 C.C.R. § 20714(a)(2), 20716(b)(3). Apparently one can not "work" at being a wife or husband, only as a mother or father. Similarly, pursuant to § 20716(j)(2), a member of the clergy may not "refer to their religious denomination", but on the other hand *may* define themselves as "rabbi" (surely Jewish), "priest" or "nun" (Catholic).

To say that the ballot designation is not important is simply unsupported by fact or law. Petitioner argues that the present ballot designation scheme obviously favors candidates who emerge from traditional backgrounds such as other elective offices or prestigious occupations and professions, and is disadvantageous for candidates who have what may be extremely popular positions or backgrounds but lack any prestigious occupation, profession or vocation, and Petitioner thereby makes an equal protection argument in this regard.

Einstein, for example, might find it more beneficial to both himself and to informing the voters to designate that he "developed theory relativity", rather than "patent clerk". Likewise, "Ex-President of the United States" (prohibited, incidentally, because of the prefix "-ex"), would surely be more informative and less misleading than the generic "attorney". The regulations are simply not neutral as they are written or as they are interpreted, and allow for unbridled discretion about important political speech.

CONCLUSION

Based on all of the foregoing, Petitioner respectfully submits that a grant of certiorari is appropriate in this important matter concerning election ballot speech.

Respectfully submitted,

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